TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

v.

GARY STEVEN JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR AMICUS CURIAE NATIONAL COUNCIL OF JUVENILE COURT JUDGES

INTRODUCTORY STATEMENT

This brief *amicus curiae* is submitted, pursuant to written consents of both parties filed with the Clerk, on behalf of the National Council of Juvenile Court

Judges.[1] The facts of the case, the pertinent constitutional and state statutory provisions, the questions presented, and the various opinions rendered below are set out in the petition for certiorari, petitioner's brief, and the joint appendix which have been filed with the Court.[2] The *amicus* accepts them for the purposes of its own brief.

THE INTEREST OF THE AMICUS AND ITS POSITION ON THE QUESTION PRESENTED

A. *Interest of the Amicus.* The National Council of Juvenile Court Judges is an unincorporated association. More than 1500 of its members are judges vested with jurisdiction to determine juvenile cases in the various states and the District of Columbia. The judges who are members of the Council handle approximately 90% of the juvenile cases that are filed each year in the courts of the Nation.

It has long been the Council's position that the informality and flexibility which are needed to fulfill adequately the juvenile court's rehabilitative functions must be carefully circumscribed by essential fairness. In pursuing this objective, on various occasions the Council has provided legislatures and courts of last resort with

[1] Hereinafter referred to either as "*amicus*" or the "Council".

[2] The decisions below which have been printed are officially reported as follows: *In re* Gary Steven J., 17 Cal. App.3d 704, 95 Cal. Rptr. 185 (1971), *habeas denied, sub nom.*, Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972), *rev'd*, 497 F.2d 1160 (9th Cir. 1974).

its members' collective knowledge about the practical problems arising from the special place that the law assigns to children.

B. *The Position of Amicus on the Issues.* The central issue in this case is whether the double jeopardy clause should have barred the trial of respondent in a criminal court on the same charge for which he was adjudicated a delinquent[3] in a juvenile court. The Council urges the Court to hold that the double jeopardy protection does bar a criminal trial after a juvenile has been adjudicated a delinquent in a juvenile court.

The double jeopardy problem arose in this case because the juvenile court below followed a procedure now used in a minority of states: *i.e.*, it transferred[4] respondent to a criminal court *after* he had been adjudicated a delinquent in the juvenile court. If this Court bars the resulting criminal trial, as a practical matter, it will require the practice now followed in a majority of the states, the District of Columbia, and the

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[3] In most jurisdictions a juvenile is "delinquent", *inter alia*, if he has violated a federal, state, or local criminal statute. *See, e.g.*, Cal. Welf. and Inst'ns. Code § 602 (Supp. 1973). Delinquency is determined at a hearing which is the equivalent of a criminal trial, except that the juvenile has no right to a jury determination. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Brown v. Cox, 481 F.2d 622, 630 (4th Cir. 1973).

[4] In nearly every jurisdiction, the juvenile court has the authority to terminate its proceedings and refer the juvenile for prosecution as an adult. *See* statutes cited in Davis, Rights of Juveniles: The Juvenile Justice System 105-109 (1974). This process has been referred to as certification, referral, bindover, waiver, and transfer. For the purposes of this brief, the process will be termed "transfer."

federal government of transferring juveniles to an adult court *before* a hearing on the issue of delinquency. In this brief, we refer to the more prevalent practice of transfer before an adjudication of delinquency as a "prior transfer," and urge that its use best safeguards the interests and rights of juveniles.

Although claims of inefficiency and inconvenience are of doubtful relevance when a defendant asserts an established and fundamental constitutional right in a criminal court, petitioner raises such claims about prior transfer as justification for withholding the double jeopardy right from respondent. *Amicus*, consisting largely of practicing juvenile court judges who have extensive experience with the everyday functioning of juvenile courts, is uniquely qualified to put to rest petitioner's contentions in this regard. *Amicus* agrees with Congress, and the majority of the state legislatures, scholars, and experts, who not only believe that the requirement of prior transfer will not significantly interfere with the operation of the juvenile justice system, but also that it is the most efficient transfer procedure to be used in juvenile courts. Therefore, the Council urges this Court to affirm the decision below. A reversal could have far-reaching detrimental effects to our system of juvenile justice, both from the standpoint of the operation of juvenile courts and the protection of the rights of juveniles.

SUMMARY OF ARGUMENT

I.

A. *Amicus* agrees with respondent's assertions that the double jeopardy clause of the Fifth Amendment should have protected him from a trial in a California criminal court on the same charge for which he was adjudicated a delinquent in a California juvenile court. This Court has held that the federal double jeopardy protection applies to state criminal courts through the due process clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). Moreover, the Court has concluded that the protection not only bars retrial within the same criminal court system, but it also bars a trial in a state criminal court when initial jeopardy attached in a non-criminal proceeding within the same state. *See, e.g., Waller v. Florida*, 397 U.S. 387 (1970). Therefore, if the Court finds that jeopardy attached in the California juvenile proceeding below, it must hold that it was error for respondent to be retried in the California criminal court.

B. An accused is placed in jeopardy during any governmental proceeding in which the tribunal has authority to impose serious restrictions on liberty. *See, e.g., United States v. Levy*, 268 U.S. 390, 393-94 (1925). This Court has often held that a juvenile court can impose severe restrictions upon a juvenile's liberty after a finding of delinquency has been entered. *See, e.g.*, In re *Gault*, 387 U.S. 1, 36, 50 (1967). Therefore, as petitioner has conceded below and in his brief before this Court, jeopardy attached during the proceedings in which respondent was found delinquent.

C. The "continuing jeopardy" doctrine, approved in *Price v. Georgia*, 398 U.S. 323 (1970), does not apply to the instant case. That doctrine has been limited by this Court to a retrial after an appeal, *see, e.g., Kepner v. United States*, 195 U.S. 100 (1904), because it is premised on a theory of "limited" waiver. 398 U.S. at 325 n. 4. Respondent did not "waive" his double jeopardy right in the instant case. It was the juvenile court, not the respondent, who sought his transfer to an adult court. Moreover, the policies underlying continuing waiver – the prohibition of a retrial on a more serious offense and the fear of allowing the guilty to go free – have no application to the case at bar.

Finally, the fact that respondent was not sentenced in the juvenile court system is irrelevant. The double jeopardy clause not only protects against multiple punishments, but against multiple trials. *Id.* at 331. A major policy underlying the clause is the prevention of "heavy personal strain" stemming from retrials for the same offense. *See, e.g., United States v. Jorn*, 400 U.S. 470, 479 (1971). Certainly, respondent was placed under great strain when forced to defend himself in separate court systems.

II.

Petitioner asserts in the alternative that even if the continuing jeopardy doctrine does not apply, the second trial should be allowed because to find otherwise might have an adverse indirect impact on the juvenile court system. However, adverse consequences to juvenile courts are not relevant in this case, for the

right at issue has already been incorporated into the Fourteenth Amendment and applied to State criminal courts to bar retrials after convictions in non-criminal proceedings. *See, e.g., Waller v. Florida, supra.*

But if this Court finds that it must consider collateral and indirect consequences to juvenile courts to determine whether respondent's criminal trial should have been barred, it should not adopt the test suggested by petitioner. Borrowing a standard from In re *Gault, supra,* In re *Winship,* 397 U.S. 358 (1970), and *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), petitioner would disallow the application of the double jeopardy right to the adult court, because the exercise of that right requires a transfer before a delinquency determination in a juvenile court. Petitioner claims such a requirement would disrupt the juvenile court.

However, *Gault, Winship,* and *McKeiver* are inapplicable to this case because they involved situations in which juveniles wanted to assert certain rights where those rights had never before been recognized – in a juvenile court. Here respondent seeks to assert a fundamental right in an adult criminal court, where the right clearly applies. The State, at a minimum, would have to demonstrate a compelling interest to defeat the applications of such a recognized right. *See, e.g., Roe v. Wade,* 410 U.S. 113 (1973); *Dunn v. Blumstein,* 405 U.S. 330 (1972).

III.

However, petitioner can show neither a compelling state interest to allow the continued use of transfer to

an adult court after an adjudication of delinquency nor that the use of a transfer before a delinquency adjudication would seriously disrupt California's juvenile justice system. Further, it is clear that the use of transfer after a delinquency hearing is fundamentally unfair to juvenile defendants.

A. The most significant evidence demonstrating the acceptability of a transfer before an adjudication of delinquency is that the procedure is required in twenty-eight states, the District of Columbia, and the federal courts. Only two states require that the transfer hearing be conducted after an adjudication of delinquency, and between three and fifteen jurisdictions permit the latter practice. Also, all recent model juvenile court acts and almost every legal commentator who has addressed this issue recommend the use of transfer prior to a delinquency determination.

B. The practical problems raised by the petitioner concerning the use of transfer prior to a delinquency determination are not significant, even to authorities in California, as is evidenced by the fact that the California Supreme Court, the California College of Trial Judges, and the former presiding judge of the Los Angeles Juvenile Court have all expressed a preference for the use of prior transfer.

C. The use of transfer after conviction is unfair to the juvenile, and at the same time impedes the juvenile court's fact-finding capabilities. When transfer decisions are made after a determination of delinquency, a juvenile runs the risk of exposing his entire case to the state, only to find that he will be retried at a later date in a criminal court by the same prosecutor. Such

exposure, in and of itself, constitutes a denial of due process. Moreover, a child, realizing that there is always a chance he may be transferred to an adult court, may tend to be reticent with juvenile court officials, thereby hampering the Court's ability to determine accurately whether the juvenile is a delinquent and the rehabilitiative treatment that may be required.

ARGUMENT

I.

THE DOUBLE JEOPARDY CLAUSE PRECLUDES A TRIAL IN AN ADULT CRIMINAL COURT PERTAINING TO THE SAME OFFENSE FOR WHICH THE DEFENDANT HAS BEEN ADJUDICATED A DELINQUENT IN A JUVENILE COURT.

A. The Double Jeopardy Clause Has Been Incorporated into The Fourteenth Amendment To Apply to State Criminal Proceedings.

Respondent claims that tne double jeopardy clause of the Fifth Amendment should have protected him from a trial in a California criminal court on the same charge for which he was adjudicated a delinquent in a California juvenile court. *Amicus* agrees that if jeopardy attached at the juvenile court proceeding, then the later trial of respondent in a criminal court should have been barred by double jeopardy.

The double jeopardy clause is "one of the oldest [procedural guarantees] found in western civilization."[5] It provides: "[N]or shall any person be subject for the

[5] Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J. dissenting).

same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST., amend. V. The clause, *inter alia*, proscribes reprosecution pertaining to the same offense for which an accused has been acquitted[6] or convicted.[7]

In *Benton v. Maryland*, 395 U.S. 784, 794 (1969), this Court held that the double jeopardy prohibition, which "represents a fundamental ideal in our constitutional heritage . . .", is incorporated within the due process clause of the Fourteenth Amendment and thus is binding on the states. There is now no question, therefore, that the protection applies to California criminal proceedings. Moreover, this Court has made it clear that the protection applies not only to a retrial within the same state criminal court, but also to a trial in a state criminal court when initial jeopardy attached in a non-criminal proceeding conducted in the same state. *See, e.g., Robinson v. Neil*, 409 U.S. 505 (1973); *Waller v. Florida*, 397 U.S. 387 (1970). *Cf. Grafton v. United States*, 206 U.S. 333 (1907).

Respondent, relying upon this well-established body of law, asserts the right to be free from a trial in a California criminal court pertaining to the same offense for which he claims initial jeopardy attached in a non-criminal proceeding within the same state – his delinquency hearing in the California juvenile court.

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[6] *See, e.g.*, United States v. Sisson, 399 U.S. 267 (1970); Benton v. Maryland, 395 U.S. 784 (1969); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Fong Foo v. United States, 369 U.S. 141 (1962); Green v. United States, 355 U.S. 184 (1957).

[7] *See, e.g.*, North Carolina v. Pearce, *supra; In re* Nielsen, 131 U.S. 176 (1889).

Clearly, respondent has a right to be free from double jeopardy in an adult criminal court. Indeed, petitioner concedes respondent's entitlement to the right: "As an adult criminal defendant, *Benton v. Maryland* clearly established [respondent's] right to the protection of the Fifth Amendment guarantee against double jeopardy." Petitioner's Brief at 16. Therefore, if jeopardy attached in the California juvenile court below, respondent should not have been tried in the California criminal court on the same charge for which he was adjudicated a delinquent.

B. Jeopardy Attached in The Juvenile Court Below.

An accused is placed in jeopardy during any governmental proceeding in which the tribunal has authority to impose serious restrictions upon his liberty. *See, e.g., United States v. Levy*, 268 U.S. 390, 393-94 (1925); *Collins v. Loisel*, 262 U.S. 426, 429 (1923); *Grafton v. United States*, 206 U.S. 333, 345-49 (1907); *Brown v. Cox*, 481 F.2d 622, 631 (4th Cir. 1973).[8]

[8] In a jury trial, jeopardy attaches when the jury has been impaneled and sworn. *See, e.g.*, Downum v. United States, 372 U.S. 734 (1963); Newman v. United States, 410 F.2d 259, 260 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 868 (1969); United States v. Lewman, 334 F. Supp. 612, 614 (E.D.Pa. 1971); People v. Friason, 22 Ill.2d 563, 177 N.E.2d 230 (1961). In a bench trial, jeopardy attaches when the court has begun to hear evidence. *Id.* In this case, "convictions" were entered both at the juvenile and criminal level, and it is undisputed that jeopardy attaches after conviction.

Therefore, jeopardy not only attaches during a criminal trial,[9] but also during other non-criminal proceedings, such as military[10] or municipal[11] trials, where serious penalties can be imposed.

This Court has never directly determined whether jeopardy attaches during a juvenile court adjudication of delinquency.[12] But it has found that such a proceeding leads to the imposition of serious restrictions on liberty. In In re *Gault*, 387 U.S. 1 (1967), the Court held that a delinquency adjudication was "comparable in seriousness to a felony prosecution," because the potential disposition, "commitment [to a juvenile institution,] is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil'." *Id.* at 36, 50. *See also* In re *Winship*, 397 U.S. 358, 365-366 (1970).

Since *Gault*, almost every court[13] and every legal

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[9]*See, e.g.*, United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, *supra.*

[10]*See, e.g.*, Grafton v. United States, *supra.*

[11]*See, e.g.*, Robinson v. Neil, *supra*; Waller v. Florida, *supra.*

[12]In *Gault*, this court noted with disapproval the fact that certain states permitted reprosecution after a child had been adjudicated a delinquent. 387 U.S. at 21-22 n.26.

[13]*See, e.g.*, Fain v. Duff, 488 F.2d 218, 225 (5th Cir. 1973), *petition for certiorari filed*, 42 U.S.L.W. 3667 (June 4, 1974) (No. 73-1768); Brown v. Cox, *supra*, 481 F.2d at 630 (*dictum*); Lewis v. Howard, 374 F. Supp. 446 (W.D. Va. 1974); United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd on other grounds* 271 F.2d 487 (D.C. Cir. 1959); *In re* Juvenile, ____ Mass. ____, 306 N.E.2d 822, 829 (1974); State v. Marshall, 503 S.W.2d 875 (Tex. Civ. App. 1973); Bryan v. Superior Court, 7 Cal.3d 575, 102 Cal. Rptr. 831, 836, 498 P.2d 1079, 1083 (1972); *In re* Benny G., 24 Cal. App.3d 371, 101 Cal. Rptr. 28

commentator[14] who has addressed the issue has concluded that jeopardy attaches when a delinquency determination is made in a juvenile court. Indeed, the Supreme Court of California, resting its decision on California and federal constitutional requirements, has followed the lead of other courts in this area and has

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(1972); Richard M. v. Superior Court, 4 Cal.3d 370 482 P.2d 664, 93 Cal. Rptr. 752 (1971); State v. Halverson, 192 N.W.2d 765 (Iowa 1971) (*dictum*); *In re* P.L.V., 176 Colo. 342, 490 P.2d 685, 687 (1971), *In re* G.D.K., 30 Colo. App. 54, 491 P.2d 81, 82 (1971); Fonesca v. Judges of Family Court, 59 Misc.2d 492, 299 N.Y.S.2d 493 (1969); Tolliver v. Judges of Family Court, 59 Misc.2d 104, 298 N.Y.S.2d 237 (1969); Collins v. State, 429 S.W.2d 650 (Tex. Civ.App. 1968). *Contra*, Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972), *rev'd*, 497 F.2d 1160 (9th Cir. 1974); Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973), *habeas granted, sub nom.*, Lewis v. Howard, *supra.*; State v. R.E.F., 251 So.2d 672 (Fla. App. 1971) *aff'd, sub nom.*, R.E.F. v. State, 265 So.2d 701 (Fla. 1972), *habeas granted, sub nom.*, Fain v. Duff, 364 F. Supp. 1192 (M.D. Fla. 1972), *aff'd*, 488 F.2d 218 (5th Cir. 1973), *petition for certiorari filed*, 42 U.S.L.W. 3667 (June 4, 1974) (No. 73-1678); *In re* Mack, 22 Ohio App.2d 201, 260 N.E.2d 619 (1970).

[14]*See, e.g.*, Carr, The Effect of the Double Jeopardy Clause on Juvenile Proceedings, 6 U. Tol.L.Rev. 1, 8 (1974) (hereinafter cited as "Carr"); Rudstein, Double Jeopardy in Juvenile Proceedings, 14 Wm. and Mary L. Rev. 266, 279-85 (1972) (hereinafter cited as "Rudstein"); Note, Double Jeopardy and the Waiver of Jursidiction in California's Juvenile Courts, 24 Stan.L.Rev. 874, 880-81 (1972) (hereinafter cited as "Note"); Antieau, Constitutional Rights in Juvenile Court, 46 Cornell L. Q. 387, 395-98 (1961) (hereinafter cited as "Antieau"). *Cf.* Whitebread and Batey, Juvenile Double Jeopardy, (submitted to the Illinois Law Forum for Spring 1975 publication) (hereinafter cited as "Whitebread and Batey").

held that jeopardy attaches to a delinquency hearing. *Richard M. v. Superior Court*, 4 Cal.3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971). Moreover, petitioner conceded this point before the Ninth Circuit,[15] and has not raised an argument to the contrary in this proceeding.[16]

Petitioner's concession is sound. A holding that jeopardy does not attach to a delinquency hearing in the juvenile court would undermine a whole line of decisions related to the instant case which constitute the very underpinning of the juvenile justice system. For example, vitually every court which has had occasion to address the issue,[17] including the Supreme Court of California,[18] has held that a juvenile cannot be reprosecuted in a juvenile court on charges for which the juvenile has been acquitted or convicted in that court. Basic to these holdings is an initial determination that jeopardy attaches at juvenile court delinquency

[15]497 F.2d at 1166.

[16]At several places in his brief, petitioner frames the issue at hand in a manner which suggests that he is arguing that jeopardy did not attach in the juvenile court below. *See, e.g.*, Petitioner's Brief at 12. But nowhere in the brief does petitioner ever conclude that jeopardy did not attach at respondent's delinquency proceeding.

[17]State v. Marshall, *supra; In re* P.L.V., *supra; In re* G.D.K., *supra*; State v. Halverson, *supra*; Fonesca v. Judges of the Family Court, *supra*; Tolliver v. Judges of the Family Court, *supra*; Collins v. State, *supra. Cf.* Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968); Sawyer v. Hauck, 245 F. Supp. 55 (W.D. Tex. 1965); Garza v. State, 369 S.W.2d 36 (Tex. Cr. App. 1963).

[18]Richard M. v. Superior Court, *supra*, note 13; *In re* Benny G., *supra*, note 13.

proceedings.[19] The cases then go on to find that juveniles are entitled to the protections of the double jeopardy clause in juvenile courts.

If this Court finds that jeopardy does not attach during juvenile delinquency hearings, it will not only have precluded the use of the double jeopardy right by defendants such as respondent in the instant case, who are transferred from the juvenile system to criminal courts, but it will also have precluded a later consideration of whether the important protection of double jeopardy applies in the juvenile courts. Of course, if this Court finds that jeopardy does attach, it will be free at a later time to decide whether juveniles may, in fact, assert the double jeopardy right in juvenile courts.[20]

Lower courts have also held, although not uniformly,[21] that in states where a prosecutor can

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[19]Many of the decisions cited above do not make specific findings that jeopardy initially attached at the first juvenile hearing. However, such a finding is implicit since the courts found that the double jeopardy doctrine applies to juvenile proceedings and they barred retrial after acquittal or conviction.

[20]At that juncture, this Court will not simply determine whether a loss of liberty is at stake during a delinquency hearing. Instead, it will apply the balancing test formulated in *In re* Gault, *supra*, *In re* Winship, 397 U.S. 358 (1970), and McKeiver v. Pennsylvania, *supra*, to determine whether juveniles are entitled to assert the right of double jeopardy in juvenile courts. For a description of the *Gault-Winship-McKeiver* balancing test, *see* Part II *infra*.

[21]*See, e.g.*, Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973), *habeas granted, sub nom.*, Lewis v. Howard, 374 F. Supp. 446 (W.D. Va. 1974).

unilaterally waive juvenile court jurisdiction by filing an information or obtaining an indictment in a criminal court, double jeopardy bars retrial in the latter court if a delinquency hearing has commenced at the juvenile level. *See, e.g., Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), *petition for certiorari filed*, 42 U.S.L.W. 3667 (June 4, 1974) (No. 73-1768); *Lewis v. Howard*, 374 F. Supp. 446 (W.D. Va. 1974). *Cf. Hultin v. Beto*, 396 F.2d 216 (5th Cir. 1968); *Garza v. State*, 369 S.W.2d 36 (Tex. Cr. App. 1963). A fundamental premise in these cases as well is that jeopardy attaches at delinquency hearings in a juvenile court.

If jeopardy is not deemed to attach at a delinquency proceeding, and therefore double jeopardy protections are withheld in both juvenile proceedings and criminal courts, prosecutors unhappy with a juvenile judge's decision will be free to reprosecute a juvenile as often as they wish until they are satified with the disposition. Thus, it will be the prosecutor, and not the juvenile court judge, who will be making the sensitive decisions about the manner in which a child is to be rehabilitated. Prosecutors are not equipped to play such a role. Moreover, the trauma a child would experience if reprosecution were permitted would undercut very seriously the informal and non-adversary atmosphere needed by a juvenile court to accomplish its rehabilitative ends.[22]

Therefore, the Council believes that the overwhelming majority of courts are correct in holding that

[22]For a further discussion about the problems of allowing a prosecutor the right to reprosecute without consent of the juvenile court, *see* Carr, *supra*, 6 U. Tol. L. Rev. at 27-28, 32-34; Rudstein, *supra*, 14 Wm. & Mary L. J. at 280-81.

jeopardy attaches at a juvenile delinquency proceeding, and urges that this Court not reverse decisions which are not now before it by its holding in this case.

C. Double Jeopardy Resulted When Respondent Was Tried in An Adult Criminal Court for The Same Course of Conduct for Which He Was Determined A Delinquent In The Juvenile Court.

1. The "continuing jeopardy" doctrine does not apply to a trial in a criminal court after a delinquency determination has been made in a juvenile court.

Petitioner contends that even though initial jeopardy attached at the juvenile delinquency hearing, and even though respondent is entitled to double jeopardy protections in a criminal trial, jeopardy did not attach a second time at the criminal trial below. Instead, according to petitioner, jeopardy simply continued from the proceedings in the juvenile court. In so arguing, petitioner mistakenly relies upon *Price v. Georgia*, 398 U.S. 323 (1970), where this Court articulated the justification for its repeated holding[23] that a retrial after a reversal upon a defendant's appeal does not violate double jeopardy principles. *Price* held that the jeopardy that attached at the retrial was a "cont-

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[23]*See, e.g.*, United States v. Ewell, 383 U.S. 116, 121 (1966); United States v. Tateo, 377 U.S. 463, 466 (1964); Green v. United States, 355 U.S. 184, 197 (1957); Bryan v. United States, 338 U.S. 552 (1950); United States v. Ball, 163 U.S. 662 (1896).

inuation" of the original jeopardy which had attached at the first proceeding.[24]

As the petitioner concedes,[25] this "continuing jeopardy" principle has never been applied to a trial which did not result from the defendant's own appeal. In fact, this Court has expressly refused to extend the doctrine to a retrial resulting from the Government's appeal of a defendant's acquittal. *See, e.g., United States v. Sisson*, 399 U.S. 267, 302-307 (1970); *Kepner v. United States*, 195 U.S. 100 (1904).

In *Price*, this Court implicitly explained why the continuing jeopardy doctrine does not apply to cases such as *Sisson* and *Kepner*. It noted that the "continuing jeopardy" doctrine is premised, *inter alia*, on a theory of "limited waiver": *i.e.*, a defendant "waives" his right to double jeopardy by pursuing an appeal of his conviction. 398 U.S. at 329 n. 4.[26] Of

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[24]Every court which has held that a trial in criminal court after a post-delinquency transfer does not violate the double jeopardy protection has relied solely upon the "continuing jeopardy" doctrine as articulated in *Price*. *See, e.g., In re* Juvenile, *supra*; Bryan v. Superior Court, 7 Cal.3d 575, 583, 102 Cal. Rptr. 831, 836, 498 P.2d 1079, 1084 (1972); *In re* Gary Steven J., 17 Cal. App.3d 704, 710, 95 Cal. Rptr. 185 (1972). While the District Court decision below held that jeopardy did not attach at the juvenile court because it was a "civil" proceeding, its primary argument related to the continuing jeopardy principle. Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972), *rev'd*, 497 F.2d 1160 (9th Cir. 1974).

[25]Petitioner's Brief at 29-30.

[26]Retrial after a successful appeal was originally justified on a "waiver" theory. *See, e.g.*, Kepner v. United States, *supra*, 195 U.S. at 131. However, in Green v. United States, *supra*, 355 U.S. at 19, this theory was rejected. In *Price*, however, the theory was once again adopted by this Court.

course, there was no "waiver" in the instant case, because respondent did not ask to be transferred to the adult court. Indeed, it was the State, through the auspices of the juvenile court judge, which sought the transfer. Therefore, this case is analogous to a government appeal after an acquittal, where double jeopardy does apply.

Moreover, a critical restriction associated with the continuing jeopardy doctrine is not applicable to a transfer to a criminal court after an adjudication of delinquency in a juvenile court. *Price* specifically held that at a retrial after a reversal a defendant could not be charged with a more serious offense than that for which he was convicted at the first trial. *Id.* at 326-330. But after transfer, unlike a reversal after an appeal, prosecutors must file a new indictment or information to commence the adult criminal proceeding, and, at that time, they are free to allege the violation of a more serious offense than was initially charged in the juvenile court. They may be especially likely to do so if the delinquency hearing revealed that the youth had committed a more serious offense than was previously known.

Finally, the strong policy for allowing retrial after an appeal does not apply in the instant case. The drafters of the double jeopardy clause contemplated that a new trial would be permitted after a reversal on appeal to avoid a hazard to the public by freeing the guilty. 1 *Annals of Congress* 753 (June 8, 1789). The First Congress directed that the initial version[27] of the clause

[27]Madison's version of the clause as initially introduced read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." 1 *Annals of Congress* 434 (June 8, 1789).

be redrafted because its original language could be construed to permit a defendant to go free after a successful appeal. *Id.*

However, no such hazard exists in this case. The respondent would not have gone free if retrial had been barred below. He would have been incarcerated in a correctional institution until he reached majority. The inapplicability of the underlying policy of *Price* to the present situation is a further reason for holding that the double jeopardy protection should have been applied to respondent's criminal trial below.

2. The policies of the double jeopardy clause are served by prohibiting the reprosecution of respondent.

Petitioner attempts to bolster his unique extension of the "continuing jeopardy" theory by arguing that no "policy" of the double jeopardy clause is served if the reprosecution of a juvenile is barred in an adult court. According to petitioner, the basic policy of double jeopardy is to prevent multiple punishments. Therefore, petitioner argues, the protection applies only if the defendant has been previously sentenced and not if, as in the respondent's case, he has merely been convicted. Petitioner's Brief at 24-27.

However, in so arguing, petitioner has ignored the fact that "the Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction, *not punishment*." *Price v. Georgia, supra,* 398 U.S. at 329 (Burger, C.J.) (emphasis added). As Mr. Justice Harlan said in *United States v. Jorn, supra,* 400 U.S. at 479:

> "The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a

> constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the *heavy personal strain which a criminal trial represents* for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." (Emphasis added.)[28]

While the policy of preventing multiple punishments may not apply in the instant case, the policy of preventing "heavy personal strain" is certainly relevant. Few defendants experience greater trauma than a juvenile forced to run the gauntlet of procedures in two separate court systems. The decision below, by preventing needless retrials, represents an application of this Court's traditional sensitivity to constitutional deprivations experienced by youthful defendants, and its recognition that those of tender years are more easily scarred by such deprivations. *See, e.g., Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

Finally, petitioner's contention that the double jeopardy clause was designed to protect only those individuals who are twice punished, implies that initial jeopardy does not *attach* until a defendant has been sentenced – a postulate which is directly contrary to the general rule that jeopardy attaches when the fact

[28]*See also*, Benton v. Maryland, *supra*; Green v. United States, *supra*, 355 U.S. at 187; *Ex parte* Lange, 18 Wall. 163 (1873); Note, Twice in Jeopardy, 75 Yale L.J. 262, 267 (1965).

finder begins to hear evidence. See, *e.g., United States v. Jorn, supra; Downum v. United States, supra.* Indeed, it has often been held that a second prosecution is barred even though the initial trial was never completed. *Id.*

In short, the constitutional history, case law, and policies behind the continuing jeopardy doctrine clearly indicate that it has no application to the situation before this Court. The doctrine is a narrow one. This Court has expressly held it cannot be extended to circumstances analogous to respondent's case.

II.

THE DETERMINATION OF WHETHER A DEFENDANT IS ENTITLED TO DOUBLE JEOPARDY PROTECTION IN A STATE CRIMINAL COURT SHOULD NOT BE BASED ON A CONSIDERATION OF POSSIBLE INDIRECT CONSEQUENCES A STATE MIGHT SUFFER FROM THE GRANT OF SUCH A RIGHT.

Petitioner asserts that if this Court does not find that the "continuing jeopardy" principle applies in the instant case, the otherwise automatic double jeopardy protection should then be withheld from respondent because of "the *possibility* that [such protection] may have a collateral, yet significant effect on the future operations of the juvenile court." Petitioner's Brief at 20-21 (emphasis added).

The potential disruption which petitioner advances as sufficient justification to bar the application of double

jeopardy is that a state juvenile court, wishing to transfer a juvenile to a criminal court, would be compelled to decide the transfer issue prior to a delinquency proceeding. *Id.* at 36. As petitioner correctly concludes, only by using the prior transfer can the resulting criminal trial be consistent with the mandates of double jeopardy clause. No jeopardy attaches at the juvenile proceeding in this instance, because resolution of the transfer issue alone does not lead to any permanent restrictions upon the accused's liberty. *See, e.g., Brown v. Cox*, 481 F.2d 622 (4th Cir. 1973); *People v. Wilson*, 7 Ill. App. 3d 158, 287 N.E.2d 211 (1972). *Cf. Collins v. Loisel*, 262 U.S. 426 (1923); *Bassing v. Cody*, 208 U.S. 386, 391-92 (1908).

It is the position of the *amicus* that if an individual asserts an established right in a forum to which the right has already been constitutionally extended by this Court, possible adverse consequences experienced by a state are irrelevant. A state's interests are considered only when the fundamental right asserted has never before been recognized,[29] or when the boundaries of a recognized right have never been fully defined.[30] The

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[29]*See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618, 634, 643 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

[30]*See, e.g.*, CSC v. Letter Carriers, 413 U.S. 548 (1973); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Epperson v. Arkansas, 393 U.S. 97 (1968). It should be noted that *Gault, Winship*, and *McKeiver* also fit into this latter caregory. In each of these cases the rights to be asserted had long been recognized, but never extended to a juvenile court.

fundamental right at stake in the instant case, double jeopardy protection, has certainly long been recognized. Moreover, this Court has clearly held that the boundaries of double jeopardy protection extend to defendants in state criminal courts after jeopardy has attached in a non-criminal proceeding where loss of liberty is at stake. *See, e.g., Robinson v. Neil, supra; Waller v. Florida, supra.*

Petitioner's argument that the assertion of the double jeopardy right in a state criminal court can be defeated if the collateral consequences of that right might disrupt juvenile processes applies a balancing test similar to that articulated by this Court in *Gault, Winship*, and *McKeiver* – "whether the application of the right is necessary to the achievement of 'fundamental fairness' and whether it will disrupt the juvenile court system." *Brown v. Cox, supra*, 481 F.2d at 630. However, as petitioner notes,[31] *Gault, Winship* and *McKeiver* are concerned only with whether certain federal constitutional rights should be extended through the Fourteenth Amendment's due process clause to the juvenile court system. That issue is not present here.

The respondent does not ask that any right be applied in a juvenile court. He does not assert either a right to be free from double jeopardy in a juvenile court or a right to a transfer hearing prior to a determination of delinquency. He has asserted his right to be free from reprosecution in an adult court.

The only connection this case has with a juvenile court is that it involves the question of whether jeopardy attached at respondent's delinquency pro-

[31] Petitioner's Brief at 16-17.

ceeding. That question does not deal with the application of a *right* to the juvenile court system, for a mere attachment of jeopardy does not in and of itself provide any protection to a juvenile. Courts have recognized this fact, and as described above,[32] have used a test far different from that developed in *Gault*, *Winship*, and *McKeiver* to determine whether jeopardy attaches to non-criminal proceedings. It is a simple inquiry into whether the tribunal can impose serious restrictions on liberty. It requires no balancing.

If this Court should nevertheless find that it must consider the collateral consequences of an affirmance, and balance them against the right asserted in this matter, the state must meet a more strict standard than that set out in *Gault*, *Winship*, and *McKeiver*. Those cases heavily weigh the balancing process in the state's favor, because the right in question is to be asserted within a juvenile court, which is a rehabilitative, rather than a punitive, tribunal. In the instant case, since respondent is not asserting his right to double jeopardy protection in a *parens patriae* context, the state, to prevail, must demonstrate at a minimum that it has a compelling interest to abridge respondent's double jeopardy claim.[33]

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[32]*See* Part I(B) *supra*.

[33]Whenever the assertion of a fundamental right is at stake, a state must show a compelling interest before it may abridge that right. *See, e.g.*, Roe v. Wade, supra, 410 U.S. at 153-55; Dunn v. Blumstein, 405 U.S. 330, 335-37 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634, 643 (1969); Griswold v. Connecticut, supra, 381 U.S. at 485. It should be noted, however, that these cases all dealt with rights which either had not previously been recognized or

However, regardless of which balancing test is used, this Court should find that the double jeopardy right applies in the instant case. Not only has California no compelling interest in abridging respondent's fundamental double jeopardy right by the use of transfer after a delinquency proceeding, but as discussed below, even under the more lenient standards contained in *Gault*, *Winship*, and *McKeiver*, respondent's double jeopardy rights are paramount, for the use of "prior transfer" will actually strengthen the benevolent purposes of the juvenile justice system. Moreover, the use of prior transfer is necessary to the achievement of fundamental fairness in juvenile courts.

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whose boundaries had not clearly been defined. As we have mentioned above, petitioner is asserting an established and well defined right, and therefore, no balancing need occur before the right can be successfully asserted.

III.

THE CONDUCT OF THE TRANSFER HEARING PRIOR TO A DETERMINATION OF DELINQUENCY WILL NOT DISRUPT THE BENEVOLENT ASPECTS OF THE STATE'S JUVENILE COURT SYSTEM AND IS REQUIRED FOR FUNDAMENTAL FAIRNESS.

A. Requiring A Transfer Proceeding to Be Conducted Prior to An Adjudication of Delinquency Will Not Disrupt the Benevolent Aspects of The Juvenile Court System.

1. Most jurisdictions preclude the use of transfer after a delinquency determination has been made.

One of the most telling indications that a prior transfer requirement will have no disruptive effect upon the positive aspects of the juvenile court system is that this procedure is already in use in most jurisdictions in this country. The statutes, rules, or decisions of twenty-three states,[34] the District of Columbia[35] and the federal government[36] explicitly require that transfer be decided prior to a determination of delinquency, thereby precluding the use of transfer after a delinquency determination has been made. Five states do not allow a juvenile to be transferred to a criminal court, hence transfer after a delinquency determination is *a fortiori* precluded.[37]

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[34]*See* Appendix hereto, column 1, *infra*, for a listing of the states and the relevant statute, rule, or decision.

[35]*Id.*

[36]*Id.*

[37]*See* Appendix, column 2, *infra*.

Five other states,[38] which have not clearly resolved the issue by statute, rule, or decision, require the use of prior transfer as a practical matter. The statutes of these states provide that juveniles may be transferred without any demonstration that they committed the crimes with which they have been charged.[39] The fact that no criminal proof is needed to achieve transfer[40] is a strong indication that the state legislatures in question did not contemplate a full-scale hearing on criminality prior to transfer.[41] These states' statutes also provide that no evidence used against a juvenile in a juvenile court can be introduced in an adult court.[42] Therefore, if juveniles are tried on the delinquency issue in a juvenile court before transfer, prosecutors cannot use any of the evidence produced at a delinquency hearing in a criminal court. Hence, the statutory framework in these five states is such that the use of transfer after an adjudication of delinquency is strongly discouraged.

The statutes of twelve other jurisdictions[43] give no

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[38]Hawaii, Indiana, New Jersey, Rhode Island, and Utah.

[39]*See* Appendix, column 3, *infra.*

[40]It has been argued that as a constitutional matter a juvenile cannot be transferred without a minimal showing of probable cause that he committed the crime with which he is charged. *See, e.g.,* Carr, *supra,* 6 U. Tol. L. Rev. at 25-26. Even if this is so, we can still infer from a legislature's failure to require any criminal showing that the legislature did not intend a hearing on the delinquency issue prior to transfer.

[41]If transfer is conducted after a delinquency determination has been made, the State will have had to prove at the delinquency hearing that the juvenile is "delinquent" beyond a reasonable doubt. *In re* Winship, *supra* note 20.

[42]*See* Appendix, column 3, *infra.*

[43]*Id.* at column 4.

clear indication of the stage of the juvenile process at which transfer should take place, and therefore it could be argued that they permit transfer after a conviction in a juvenile court. However, it is doubtful that as a practical matter transfer after a delinquency determination is prevalent, since there are no reported decisions arising from these states about this critical issue. Moreover, one of the twelve states, Connecticut, allows a transfer only when the juvenile has been charged with murder, thereby indicating that transfers after a delinquency proceeding are infrequent.[44]

In three states,[45] including California, a rule or decision permits transfer to take place after a delinquency proceeding has been completed. However, the fact that the California Supreme Court[46] and the California College of Trial Judges[47] have both concluded that prior transfer is preferable casts doubt on whether the practice of transfer after a delinquency determination is widespread even in these jurisdictions. In *Donald L. v. Superior Court*, 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850 498 P.2d 1098, 1101 (1972), the California Supreme Court took note that the "usual" practice was for the juvenile courts to decide the transfer issue prior to any determination of delinquency.

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[44] *Id.*

[45] *Id.* at column 5.

[46] Donald L. v. Superior Court, 7 Cal.3d 592, 598, 102 Cal. Rptr. 850, 498 P.2d 1098, 1101 (1972).

[47] California Juvenile Court Deskbook, § 10.4 at 148-50 (California College of Trial Judges) (1972).

Finally, only two states[48] require that transfer be determined after an adjudication of delinquency. It should also be noted that Massachusetts, which requires transfer after a delinquency determination, and Ohio, which permits the use of this latter procedure, have strict exclusionary rules precluding the use of any evidence introduced in the delinquency proceeding in any other forum.[49] As mentioned above, such a restriction makes a criminal trial almost an impossibility after there has been a delinquency hearing in the juvenile court.

In sum, thirty-three states, the District of Columbia, and the federal government either specifically, or as a practical matter, preclude the use of transfer after an adjudication of delinquency. Only two states require that transfer be held after a delinquency determination, and between three and fifteen permit the practice.

2. Most model juvenile court acts and other authorities preclude or discourage the use of transfer after a delinquency determination.

Contrary to petitioner's assertions,[50] virtually every model juvenile court act prohibits the use of transfer after a delinquency adjudication. For example, section 34 of the *Uniform Juvenile Court Act*[51] specifically

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[48]*See* Appendix, column 6, *infra.*

[49]Mass. Ann. Laws, Ch. 119, § 60 (Cum. Supp. 1972); Ohio Rev. Code Ann. § 2151.358 (1971).

[50]Petitioner's Brief at 49-50.

[51]Uniform Juvenile Court Act, 9 Uniform Laws Ann. 429 (Master ed. 1973).

requires that transfer be conducted prior to the delinquency determination. And, while the *Standard Juvenile Court Act*,[52] published by *amicus* and the National Council on Crime and Delinquency in 1959 does not clearly indicate when a transfer hearing should be held, the latter organization wrote the *Model Rules for Juvenile Courts*[53] in 1969, which emphatically mandate that transfer be decided "before the commencement of the adjudicatory hearings."[54] As evidenced by this brief, *amicus* agrees with this requirement. Moreover, section 31(a) of the *Legislative Guide for Drafting Family and Juvenile Court Acts*,[55] which petitioner describes as "not expressly encompass[ing] the transfer situation and thus [not able to] be read as taking a definite position against transfer as a dispositional alternative,"[56] also explicitly requires that the transfer hearing be held prior to a hearing on the merits of a delinquency petition.

In addition, the Juvenile Justice Standards Project, an advisory panel of juvenile court experts assembled and sponsored by the American Bar Association and the Institute for Judicial Administration, has recently approved, on a tentative basis, a standard which requires that the transfer hearing be held prior to an

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[52]Standard Juvenile Court Act § 13 (6th Ed. 1959).

[53]Model Rules for Juvenile Courts (National Council on Crime and Delinquency 1969).

[54]*Id.* at Rule 9.

[55]Sheridan, Legislative Guide for Family Drafting and Juvenile Court Acts § 31(a) (Children's Bureau, Department of Health, Education & Welfare 1969).

[56]Petitioner's Brief at 49.

adjudication of delinquency.[57] Indeed, almost every legal commentator[58] who has addressed this issue has concluded, as a matter of constitutional law and of practicality, that it is preferable to conduct the transfer hearing prior to a delinquency determination.

Finally, even those courts[59] which have held that transfer after a delinquency hearing does not violate the double jeopardy clause have not done so on the ground that such a transfer proceeding is more practical than transfers conducted at the outset of the juvenile

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[57]The American Bar Association and Institute for Judicial Administration Juvenile Justice Standards Project, Standards on Waiver of Juvenile Court Jurisdiction, §2.1(e) (Tentative Draft December, 1974). While this draft must be approved by the ABA's House of Delegates before it becomes final, approval by the Project itself constitutes an important endorsement of prior transfer.

[58]Whitebread and Batey, *supra* note 14; Rudstein, *supra* note 14; Note, *supra* note 14; Antieau, *supra* note 14. *Contra,* Carr, *supra* note 14. It should be emphasized that the only situation in which Professor Carr argues that the double jeopardy protection should not apply is when a transfer hearing is conducted after the delinquency proceeding. In all other situations, including when the youth is transferred after a dispositional order has been entered (*e.g.*, when the youth has been found delinquent and has been incarcerated in a correctional institution), Professor Carr believes the double jeopardy protection should apply.

[59]*See, e.g.*, Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972) *rev'd,* 497 F.2d 1160 (9th Cir. 1974); *In re* Juvenile ____ Mass. ____, 306 N.E.2d 822, 828-30 (1974); Bryan v. Superior Court, 7 Cal.3d 575, 580-83, 102 Cal. Rptr. 831, 834-36, 498 P.2d 1079, 1082-85 (1972); *In re* Gary Steven J., *supra,* 17 Cal. App.3d, at 709-10, 95 Cal. Rptr. at 189-90 (1971); Carter v. Murphy, 476 N.W.2d 28, 31-32 (Mo. Ct. App. 1971); *In re* Mack, 22 Ohio App.2d 201, 204, 260 N.E.2d 619, 621 (1970).

process. Instead, these courts appear to have rested their decisions on legal doctrines pertinent to the double jeopardy protection, and not out of a concern for the practical workings of the juvenile court.[60]

3. As a practical matter, a prior transfer is the preferable procedure.

This Court's concern about the benevolent aspects of the juvenile court system has always focused upon insuring that the delinquency determination is informal,[61] non-adversarial,[62] confidential,[63] and free from any stigma of criminality.[64] The conduct of a transfer hearing prior to the delinquency hearing should further, rather than detract, from these objectives. If juveniles are secure in the knowledge that they will not

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[60]Almost all of the courts listed in n.59, *supra*, have rested their decision on the "continuing jeopardy" principle. *In re* Mack, rested its decision on the ground that jeopardy does not attach at a juvenile court proceeding. The district court below only partially based its decision on this latter ground.

[61]*See, e.g.*, McKeiver v. Pennsylvania, *supra*, 403 U.S. at 534; *In re* Winship, *supra*, 397 U.S. at 366-67; *In re* Gault, *supra*, 387 U.S. at 25-27.

[62]*See, e.g.*, McKeiver v. Pennsylvania, *supra*, 403 U.S. at 550; 575; *In re* Winship, *supra*, 397 U.S. at 375.

[63]*See, e.g.*, McKeiver v. Pennsylvania, *supra*, 403 U.S. at 550; *In re* Winship, 397 U.S. at 366-67; *In re* Gault, *supra*, 387 U.S. at 24-25.

[64]*See, e.g., In re* Winship, *supra*, 397 U.S. at 366; *In re* Gault, *supra*, 387 U.S. at 23-24.

be transferred to an adult court during or after their delinquency hearing, common, though often unrealistic, fears that they will offend juvenile authorities with recitations of their behavior and background will be somewhat alleviated. They will not have to worry that they may suddenly be transferred to a criminal court because of a candid admission. Cooperation between the juvenile and the court's officers will be increased, and the adversary nature of the delinquency and dispositional phases of the juvenile process will be reduced. Moreover, prior transfer will in no way affect the confidentiality of the juvenile process, nor will it add any stigma of criminality to the system.

The Council also believes, and will indicate below that the specific practical problems raised concerning the use of prior transfer are not of controlling significance.

a. Prior transfer will not "engraft" a new procedure to, or cause undue delay in, the juvenile system.

Petitioner asserts that requiring transfer to be conducted at the outset of a juvenile proceeding will add a "cumbersome" procedure to the California juvenile court system. According to petitioner, instead of merely holding a hearing on delinquency and conducting a dispositional process at which time the juvenile can be transferred, the Court will be required to hold a third hearing–dealing solely with the transfer issue–prior to the trial on delinquency. Petitioner's Brief at 36-45.

However, even the former presiding Judge of the Los Angeles Juvenile Court, Marvin A. Freeman, in denying

respondent's petition for a writ of habeas corpus, recognized that the use of prior transfer would not result in a new and cumbersome proceeding. In this regard, he said:

> "I don't disagree, counsel, as to what would be the *better procedure* is that at the detention hearing,[65] [which is held prior to the determination delinquency] the decision be made as to whether there should be a fitness hearing. At the detention hearing it is clear that the police report may be considered, anything probation introduces may be considered.[66] There is no requirement that evidence be limited to competent evidence, and in the usual case it should be at the detention hearing.
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> I will go further and say I don't think that the Juvenile Court would be crippled if there were no 707 as it is now constituted, that is, *I don't know*

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[65]California, as is true in most states, requires that a detention hearing be held one judicial day after a delinquency petition is filed in juvenile court. The purpose of the hearing is to determine whether the minor should be released pending further hearings. Cal. Welf. and Inst'ns Code §§ 632, 635, 636 (1972). *See In re* William M., 3 Cal.3d 16, 89 Cal. Rptr. 33 (1970). *See also* Levin & Sarri, Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States (National Assessment of Juvenile Corrections) (1974) at 26-27, for a listing of the 36 states which provide a similar screening apparatus.

[66]One commentator has noted: "[T]he facts underlying several juvenile court cases indicate that the probation report is often prepared and given to the judge prior to the [delinquency] hearing. Consequently, it is simply a matter of time spent waiting for the report to be considered by the judge, not a matter of time spent in preparation." Note, *supra*, 24 Stan.L.Rev. at 897.

our operation would really be hampered if the rule were laid down that at the arraignment or detention hearing or in any event before the introduction of evidence at the adjudication the court may set the matter for a [transfer] hearing." Joint Appendix at 43 (emphasis added).

The recognition that prior transfer is preferred to transfer after a delinquency determination by the California Supreme Court,[67] by the California College of Trial Judges,[68] and by Judge Freeman, indicates that many California juvenile courts are using the prior transfer at present, and that petitioner's vision of a third, cumbersome hearing is unwarranted.

In addition, a prior hearing does not have to be held in every case. In many situations, a judge can determine without a hearing that a child should not be

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[67] Donald L. v. Superior Court, *supra* note 46.

[68] California Juvenile Court Deskbook, *supra*, § 10.4 at 148-50.

transferred. For example, if the child is young, and has committed a first minor offense, most courts immediately recognize that no transfer hearing is needed.[69]

Finally, even when the juvenile court considers transfer after a hearing on delinquency, it must hold a separate transfer hearing. If the child proves he is amenable to rehabilitation, the juvenile judge would then consider other dispositional alternatives. Hence, in such a situation, as when prior transfer is required, there is a possibility that three hearings—relating to delinquency, transfer, and disposition—will be held. In fact, by requiring an early decision on transfer, the juvenile court may eliminate, rather than add, procedures. If the juvenile is transferred, there will be no need for a delinquency or dispositional hearing.

b. The need for judges who rule on transfer to recuse themselves from the delinquency proceeding is negligible.

Petitioner also contends that since many of the issues considered at a transfer hearing are potentially prejudicial to a consideration of the juvenile's guilt[70] juvenile court judges using prior transfer will be

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[69] On the other hand, certain juveniles, because of their recidivism may clearly be candidates for transfer. *See, e.g.*, Note, *supra*, 24 Stan.L.Rev. at 898-99. In these situations as well, a transfer hearing should not be a time consuming process.

[70] The juvenile court judge's consideration of the juvenile's character and background at the transfer hearing might taint his decision on the issue of whether the juvenile has committed the crime with which he is charged.

compelled to recuse themselves from the delinquency hearing. A few jurisdictions do require the reassignment of a judge after he has chosen not to transfer the juvenile.[71] However, these jurisdictions also permit the juvenile, or an interested party, to waive the transfer judge's dismissal.[72]

The reason for this waiver provision is clear. A juvenile will ordinarily not want to dismiss a judge who has refused to transfer him to a criminal court. There is a risk of having another judge assigned to the case who is not as sympathetic. Moreover, in many cases, a rapport has been established between the judge and the juvenile, and the goal of rehabilitation is well on its way to being met. In practice, then, the dismissal of a judge in this instance would be rare. And, of course, recusal would not even be an issue where the judge had transferred the child to a criminal court or where the judge did not conduct a hearing due to the child's obvious amenability to rehabilitation.

But even in situations where recusal does take place, the supply of judges in large urban jurisdictions would negate the problem. And, smaller jurisdictions do not have the volume of juvenile case work that would cause the recusal situation to arise frequently. Moreover, even if the problem were to occur, it is not unusual for

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[71] Fla. Stat. Ann. § 39.09(2)(g) (1974); Tenn. Code Ann. § 37-234(3) (Supp. 1973); Wyo. Stat. § 14-115.38(c) (Supp. 1973). *See also*, Donald L. v. Superior Court, 7 Cal.3d 592, 598, 102 Cal. Rptr. 850, 853, 498 P.2d 1098, 1101 (1972); Uniform Juvenile Court Act, *supra*, note 51, § 34(E).

[72] *Id.*

judges in sparsely populated localities to cross jurisdictional lines in order to avoid a local judge's potential conflict of interest.

c. The bifurcation process will not be disrupted by a prior transfer proceeding.

Petitioner contends that a prior transfer requirement would disrupt California's commitment to a bifurcated juvenile hearing,[73] where the delinquency issue is heard separately from the dispositional determination. The juvenile judge, according to petitioner, would make dispositional judgments relating to the child's background and social behavior at the transfer hearing, which could be prejudicial if the issue of guilt must be decided.

Of course, the California Supreme Court, which supports bifurcation,[74] has also indicated a preference for prior transfer, thereby suggesting that in its view the two are compatible.[75] Moreover, the California statutory provision[76] which provides for transfer contemplates that issues relating to transfer could be considered with the delinquency determination since the trial judge is given the authority to enter a transfer order at any time during the delinquency hearing.

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[73] *In re* Gladys R., 1 Cal.3d 855, 589-60, 83 Cal. Rptr. 671, 674-75, 464 P.2d 127, 130-31 (1970).

[74] *Id.*

[75] Donald L. v. Superior Court, *supra* note 46.

[76] Cal. Welf. and Inst'ns. Code § § 707 (1972).

Finally, this entire issue is easily resolved by a requirement that juvenile court judges, having passed upon transfer, must recuse themselves from the delinquency determination, unless the child waives his right to the judge's dismissal. With this resolution, the juvenile can either opt for complete bifurcation–*i.e.*, a new judge who would determine delinquency and then, if necessary, consider disposition–or allow the transfer judge with whom the child may have established a rapport to hear the issue of delinquency.

d. The juvenile court has sufficient resources to gather all relevant information about a juvenile at a prior transfer hearing.

In its petition for certiorari, petitioner complained that requiring a prior transfer would prevent the State from "removing disruptive or depraved individuals from its programs, [thereby ending] a promising experiment." Petition for Certiorari at 17. By this argument, petitioner has implied that the State does not have adequate resources at its disposal to make an informed judgment about the character of a juvenile prior to a hearing on delinquency, an implication that has no basis in fact. As one state supreme court has said:

> "[I]f a county attorney is causing juvenile cases to be investigated properly . . . he will know in advance whether he desires to prosecute criminally and he can so move the court at or before the outset of the hearing. He has available the investigative facilities of the probation officer, the law enforcement officers, and the social services staff. . . ." State v. Halverson, 192 N.W.2d 765, 769 (Iowa 1971).

Moreover, petitioner himself has said that California juvenile correctional institutions are capable of handling the worst kind of disciplinary problems.[77] But even if this were not the case, this *amicus* believes that the doctrine of double jeopardy is flexible enough to permit transfer after an adjudication of delinquency where information, which could not have been discovered at an earlier stage, clearly demonstrates that a youth is not amenable to juvenile treatment.[78]

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[77] A commentator, summarizing an interview with petitioner Breed, concluded: "[Petitioner Breed] has suggested that his organization could easily handle [disruptive juveniles who have mistakenly not been transferred] and has concluded that the [California Youth Authority] could abide by a system of irrevocable [transfer] decisions made prior to the attachment of jeopardy with absolutely no alteration in its current attitudes, administration, or effectiveness." Note, *supra*, Stan.L.Rev. at 900.

[78] One major exception to the double jeopardy clause is found in the "manifest necessity" doctrine: that is, a second trial is allowed when an unforeseen intervening force causes the disruption of the initial trial. *See, e.g.*, Downum v. United States, *supra*, note 8; Gori v. United States, 364 U.S. 367 (1961); Wade v. Hunter, 336 U.S. 684 (1949); Thompson v. United States, 155 U.S. 271 (1894). The doctrine has been limited to mistrials. However, it could be argued that if a child withheld important evidence from the court or juvenile authorities and such evidence clearly indicated that the youth ought to be tried as an adult, then the juvenile court might be able to transfer the juvenile to a criminal court. Also, if a child not transferred proved to be unpredictably and seriously disruptive after disposition, the juvenile court might be free, after making suitable findings, to transfer the youth to a criminal court on the ground of "manifest necessity." Indeed, such a ruling is compatible with state statutes which permit a youth correctional authority to return a child to the juvenile court if the child is incorrigible. Cal. Welf. and Instn's. Code § § 707, 780, 1731.1 (1972).

e. Prior transfer will not lead to unfair plea bargaining.

One commentator[81] has suggested that requiring the transfer decision to be made before a determination of delinquency will cause an unwarranted increase in a prosecutor's plea bargaining power. According to the argument, if a state has a weak case against a juvenile with a bad prior record, the prosecutor, knowing that he will not have to prove delinquency beyond a reasonable doubt to achieve transfer,[80] will be tempted to coerce the child into pleading guilty by threatening to seek transfer to a criminal court. The arument continues that a juvenile to whom such a bargain is extended, uncertain of the case against him and frightened by the prospect of a trial in a criminal court, will be especially vulnerable to the prosecutor's offer.

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[79] Carr, *supra*, 6 U. Tol. L. Rev. at 49-51.

[80] If the transfer hearing is held prior to a hearing on delinquency, the prosecutor, in some states, does not have to present any evidence demonstrating that the juvenile committed the offense with which he is charged. *See* Appendix, column 3, *infra*. *Cf.* n.40 *supra*. However, in some states the prosecutor must show that there is probable cause that the juvenile committed the act with which he is charged. *See, e.g.*, Colo. Rev. Stat. Ann. §§ 22-3-6(4)(a)-(c)-8(1) (Supp. 1969). A great many jurisdictions merely require that the seriousness of the offense be considered in transfer. *See, e.g.*, Okla. Stat. Ann. tit. 10, § 1112(b) (Supp. 1974). However, in all jurisdictions that permit transfer the fundamental question is whether the child can be rehabilitated in the treatment facilities available to the juvenile court. *See, e.g.*, The President's Commission on Law Enforcement and Administration of Criminal Justice, Task Force Report: Juvenile Delinquency and Youth Crime, Appendix B, Table 5, at 78 (1967).

It is the view of this *amicus*, however, that this hypothetical tactic would be unethical,[81] if not illegal.[82] Moreover, the opportunities for questionable plea bargaining may be worse if transfer is not decided until after a hearing on delinquency. At that time, a prosecutor will have been exposed to the juvenile's case. Absent a strict exclusionary rule, the chances of reconviction in a criminal court will be strong. In this circumstance, prosecutors will be in an excellent bargaining position to obtain a guilty plea to a lesser-included adult offense. And, since there would clearly be sufficient evidence to convict after a delinquency proceeding, such bargaining may not be illegal.

B. Allowing the Transfer Hearings To Be Held after An Adjudication of Delinquency Is Fundamentally Unfair to The Juvenile.

In *Winship* and *McKeiver*, this Court made it clear that the necessity of a procedure in a juvenile court is

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[81] ABA Standards, The Prosecution Function §§ 4.1(c), 4.2 (Approved Draft 1971). A commentary to the former standard concludes:

> "Although the prosecutor is under no obligation to reveal any evidence to defense counsel in the course of plea discussion, truth is required in the presentation of facts relating to the case or any mitigating facts to the defense counsel. The prosecutor's basic duty to seek a just result as well as his obligation to eschew the use of deception in dealing with the evidence also forbid his misrepresenting the law or sentencing practices of the court in plea discussions. . . ." *Id.* at commentary to § 4.1(c).

[82] *See, e.g.*, Monroe v. State Bar, 55 Cal.2d 145, 10 Cal. Rptr. 257, 358 P.2d 529, 533 (1961). *See also*, ABA Standards, The Prosecution Function, *supra*, commentary to § 4.2 (explaining requirement in many jurisdictions that the prosecutor prove a *prima facie* case as a condition to entry of guilty plea).

measured by the "fairness" it brings to the juvenile justice process.[83] As we demonstrate below, the use of transfer after disposition is "fundamentally unfair" to juveniles, and therefore is not needed in that process.

1. Exposure of the juvenile's entire case to the government, which may have the opportunity to retry the juvenile in a criminal court, is fundamentally unfair.

The Council believes that the greatest injustice emanating from the use of transfer after a disposition of delinquency is that if the juvenile is transferred, the Government will have had the benefit of reviewing the juvenile's case prior to the criminal trial. In its decision below, the Ninth Circuit stressed this problem:

> "Nowhere in our criminal system do we allow the prosecution to review in advance the accused's defense and, as here, hear him testify about the crime charged. The most heinous and despicable criminal is saved from such an invasion of his fundamental rights. Yet, if we adopt California's position, we approve having such a procedure applied to those of tender years. This offends our concepts of basic even-handed fairness." 497 F.2d at 1168.

Some jurisdictions which allow the use of transfer after a delinquency determination have exclusionary rules which prevent evidence obtained in a juvenile

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[83] In *McKeiver*, Mr. Justice Blackmun stated: "[T]he applicable due process standard in juvenile proceedings is fundamental fairness, as developed by [*Gault*] and [*Winship*]." 403 U.S. at 528.

process from being used in an adult court.[84] For example, California, by case law,[85] urges exclusion in a criminal court of testimony given by the defendant in the juvenile system. However, this limited rule still permits the prosecutor to use any evidence that has been obtained on the basis of the juvenile's testimony or to use any other testimony presented with the juvenile's case. *See, e.g., Carr, supra*, 6 U. Tol. L. Rev. at 53. Hence, California's limited exclusionary device does not ameliorate the unfairness a youth may experience in this regard.

2. The use of transfer after an adjudication of a delinquency creates an unfair dilemma for juveniles.

If juveniles must wait until they have been tried on delinquency charges to know whether they will be transferred to a criminal court, after detention they will be faced with the cruel decision of whether it is more likely that they will be transferred if they cooperate with juvenile authorities or if they remain silent. Some juveniles, confronting this unfair choice, may tend to be unduly reticent because of a belief that some aspect of their behavior or background will be sufficiently offensive to require transfer to an adult court. Indeed,

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[84] For a complete listing of states which provide various types of exclusionary protection to the juvenile, *see* Carr, *supra*, 6 U. Tol. L. Rev. at 53 and nn. 298-99; Rudstein, *supra*, 14 Wm. and Mary L. Rev. at 293 and nn. 118 & 119.

[85] Bryan v. Superior Court, 7 Cal.3d 575, 587, 102 Cal. Rptr. 831, 839, 498 P.2d 1079, 1087 (1972).

their belief may be unrealistic, because juveniles in some instances are more critical of their own past behavior than are seasoned juvenile authorities. On the other hand, juveniles may also be unduly coerced into saying more than they would wish out of fear that undue reticence, a possible indication of unrepentance, will lead to transfer. In this instance, their right to be free from self-incrimination may be jeopardized because of the pressures the system places upon them. The Supreme Court of California recognized the severity of this dilemma when it said:

> "The minor who is subject to the possibility of a transfer order should not be put to the unfair choice of being considered uncooperative by the juvenile probation officer and juvenile court because of his refusal to discuss his case with the probation officer, or of having this statement used against him in subsequent criminal proceedings." *Bryan v. Superior Court, supra*, 7 Cal. 3d at 587-88, 102 Cal. Rptr. at 840, 498 P.2d at 1088 (1972).

It is highly unfair to expose a juvenile to this kind of uncertainty. And to the extent that this uncertainty leads to reticence, the fact-finding process of the juvenile court is hindered, a process which the plurality opinion in *McKeiver* clearly established should never purposefully be impeded. 403 U.S. at 543.

In sum, a requirement of prior transfer is the only mechanism which ensures fundamental fairness to the juvenile. Moreover, it best serves the interests of the juvenile court system, for in most instances, it is the most efficient procedure for deciding the transfer issue, and is best suited to the informal, rehabilitative nature of juvenile courts. Therefore, this *amicus* maintains that

the requirement of prior transfer does not justify withholding the double jeopardy protection from respondent, nor has there been any other justification advanced which would warrant such a result.

CONCLUSION

For the foregoing reasons, the Council urges that the decision below be affirmed.

Respectfully submitted,

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APPENDIX

Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
ALABAMA				Ala. Code, tit. 13 § 264 (1958)		
ALASKA				Alaska Stat. § 47.10.060;[1] Alaska R. of Juv. Pro. 3(a) (1974)		
ARIZONA	Ariz. Juv. R. 12 (1973)					
ARKANSAS	Ark. Stat. Ann. § 45-224 (1964)					
CALIFORNIA					Cal. Welf. & Instn's. Code § 707 (1972) [2]	
COLORADO				Colo. Rev. Stat. Ann. §§ 22-3-6(4)(a)-(c)-8(1) (Supp. 1969)		
CONNECTICUT				Conn. Gen Stat. Ann. § 17-60(a) (Supp. 1974) (only allows transfer for murder)		

[1] See, In re *P.H.*, 504 P.2d 837 (1972).

[2] Naturally, this categorization discounts the decision under review.

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
DELAWARE	Del. Code Ann., tit. 10, § 938 (Supp. 1972)					
FLORIDA	Fla. Stat. Ann. § 39.09(2)(a) (1974)					
GEORGIA	Ga. Code Ann. § 24A-2501(a) (Supp. 1974)					
HAWAII			Hawaii Rev. Stat. § 571-49 (1968); Hawaii Rev. Stat. § 571-22(a) (Supp. 1973)			
IDAHO	Idaho Code § 16-1806(1)(a) (Supp. 1971) [3]					
ILLINOIS	Ill. Ann. Stat., ch. 37, § 702-7 (3)(1972)					
INDIANA			Ind. Stat. Ann. § 31-5-7-15 (1973); Ind. Stat. Ann. § 31-5-7-14 (1973)			
IOWA	Iowa Code. Ann. § 232.72 (1969) [4]					
KANSAS				Kan. Stat. Ann. § 38-808(b) (1973)		

[3] *See State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

[4] *See State v. Halverson*, 192 N.W.2d 765 (Iowa 1971).

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KENTUCKY				Ky. Rev. Stat. § 208.170(1) (1972), *as amended*, Ky. Rev. Stat. § 208. 170 (Supp. 1974)		
LOUISIANA		X				
MAINE				Me. Rev. Stat. Ann., tit. 15, § 2611(3) (1965)		
MARYLAND	Md. Ann. Code art. 26, § 70-16 (a) (1973)					
MASSACHUSETTS						Mass. Ann. Laws. ch. 119, § 61 (1969) Mass. Dist. Ct. R. 85A (1974) [5]

[5] *See* In re *Juvenile*, ___ Mass. ___, 306 N.E.2d 822 (1974).

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
MICHIGAN				Mich. Stat. Ann. § 27.3178 (598.4(4))(1974)		
MINNESOTA	Minn. Juv. R. 8-1(2) (1974)					
MISSISSIPPI	Miss. Code Ann. § 43-21-31 (1973)					
MISSOURI					Mo. Ann. Stat. § 211.071 (1969) [6]	
MONTANA	Mont. Rev. Code § 10.1229 (Supp. 1974)					
NEBRASKA		X				
NEVADA				Nev. Rev. Stat. § 62.080 (1973)		
NEW HAMPSHIRE	N.H. Rev. Stat. Ann., § 169.21 (1964)					

[6] *See Carter v. Murphy*, 465 S.W.2d 28 (Mo. Ct. App. 1971).

Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
NEW JERSEY			N.J. Stat. Ann. § 2A:4-39 (1952); N.J. Rev. Stat. Ann. 2A:4-48(b) (Supp. 1974)			
NEW MEXICO	N.M. Stat. Ann. § 13-14-27(a) (Supp. 1973)					
NEW YORK		X				
NORTH CAROLINA	N.C. Gen. Stat. § 7A-280 (1969)					
NORTH DAKOTA	N.D. Central Code § 27-20-34 (i) (1974)					
OHIO					Ohio Juv. R. 30(A) (1974)	
OKLAHOMA	Okla. Stat. tit. 10, § 1112 (b) (Supp. 1974)					

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
OREGON				Oregon Rev. Stat. § § 419.482, 419.507, 419. 533 (1973)		
PENNSYLVANIA	Pa. Stat. Ann., tit. 11, § 50-325(a) (Supp. 1974) [7]					
RHODE ISLAND			R.I. Gen. Laws Ann. § 14-1-40 (1969); R.I. Gen. Laws Ann. § 14-1-7 (Supp. 1973)			
SOUTH CAROLINA				S.C. Code Ann. ch. 8, § 15-1281.13 (1962)		

[7] *See Commonwealth ex. rel. Freeman v. Superintendent*, 212 Pa. Super. 422, 242 A.2d 903 (1968).

Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
SOUTH DAKOTA				S.D. Compiled Laws Ann. §§ 26-8-22.7, 26-11-4 (Supp. 1974)		
TENNESSEE	Tenn. Code Ann. § 37-234 (a) (Supp. 1974)					
TEXAS	Tex. Fam. Code § 54.02(a) (2) (1973)					
UTAH			Utah Code Ann. § 55-10-105(3) (1973); Utah Code Ann. § 55-10-86 (1973)			
VERMONT		X				
VIRGINIA	Va. Code Ann., § 16-176(a)(2) (Supp. 1974)					

[8] *See Lewis v. Howard*, 374 F. Supp. 446, 449 (W.D. Va. 1974).

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
WASHINGTON		X				
WEST VIRGINIA						W.Va. Code Ann. §49-5-14 (1966)
WISCONSIN	Wisc. Stat. Ann. §48.18 (Supp. 1974)					
WYOMING	Wyo. Stat. Ann. §14-115.38 (Supp. 1973)					
DISTRICT OF COLUMBIA	16 D.C. Code §2307(a)					
FEDERAL GOVERNMENT	18 U.S.C. §5032 as amended by Public Law 93-415, §502					
TOTALS	25	5	5	12	3	2